

1991

Dispute Resolution in the United States: Concerns and Opportunities in an Era of Globalization of Securities Markets

Mary Kay Kane

UC Hastings College of the Law, kanem@uchastings.edu

Follow this and additional works at: http://repository.uchastings.edu/faculty_scholarship



Part of the [Dispute Resolution and Arbitration Commons](#)

Recommended Citation

Mary Kay Kane, *Dispute Resolution in the United States: Concerns and Opportunities in an Era of Globalization of Securities Markets*, 14 *Hastings Int'l & Comp. L. Rev.* 405 (1991).

Available at: http://repository.uchastings.edu/faculty_scholarship/291

This Article is brought to you for free and open access by UC Hastings Scholarship Repository. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of UC Hastings Scholarship Repository. For more information, please contact marcusc@uchastings.edu.



Faculty Publications

UC Hastings College of the Law Library

Author: Mary Kay Kane
Source: Hastings International and Comparative Law Review
Citation: 14 Hastings Int'l & Comp. L. Rev. 405 (1991).
Title: *Dispute Resolution in the United States: Concerns and Opportunities in an Era of Globalization of Securities Markets*

Originally published in HASTINGS INTERNATIONAL AND COMPARATIVE LAW REVIEW. This article is reprinted with permission from HASTINGS INTERNATIONAL AND COMPARATIVE LAW REVIEW and University of California, Hastings College of the Law.

Dispute Resolution in the United States: Concerns and Opportunities in an Era of Globalization of Securities Markets

By PROFESSOR MARY KAY KANE*

Contemplation of the globalization of securities markets necessitates addressing the concern of how the inevitable disputes which will occur could likely be handled in each of the respective countries where parties to securities transactions reside. This Article will provide some insights into dispute resolution in the United States today as it may be relevant to the securities market participants of the future.

Several general questions immediately suggest themselves. First, what types of claims would likely be the subject of civil litigation in U.S. courts? Second, if litigation is pursued as the means of resolving a dispute, what distinctive features of American procedure are likely to affect the shape and scope of that litigation? Third, are there any special rules or protections applicable in international litigation such as might occur in a future global market? And, fourth, what alternative dispute resolution techniques may be utilized to avoid litigation altogether or to promote the settlement of securities lawsuits, and how do those devices operate?

This Article will identify both the problems and areas that need to be studied more fully, as well as some of the methods and opportunities for avoiding or lessening some concerns. In this way, it may be possible to begin setting an agenda for developing means to improve existing dispute resolution processes, thereby accommodating the special needs of future participants in a global securities market.

I. DISTINCTIVE FEATURES OF AMERICAN SECURITIES LITIGATION

There are five features of securities litigation in U.S. courts that deserve attention. Each identifies a facet of American litigation that is

* Academic Dean and Professor of Law, University of California, Hastings College of the Law. This Article is a version of a Paper delivered at the Nihon-Hastings Conference.

somewhat unique in the world and may be viewed as particularly troublesome, if not mystifying, to foreign litigants. Each feature also creates particular burdens and difficulties for those defending against securities litigation.

The first feature relates to where securities litigation may be brought. This is a salient concern in that the United States is an extremely large country geographically and contains both a federal court system, stretched across all fifty of its states, as well as independent state court systems in each of the states. Insofar as the plaintiffs' claims rest on allegations that the defendants violated one of the many federal laws dealing with the issuance of securities or with trading on the securities markets, suits typically are limited to the federal court system.¹ However, there are few statutory requirements or barriers directing plaintiffs to any particular federal court,² leaving the plaintiffs with almost total control of the court's selection. Plaintiffs may allege that defendants' conduct not only violates the federal securities laws, but also that it violates existing state statutes.³ Plaintiffs further may claim that, even in the absence of a statutory violation, defendants' conduct was fraudulent in some way, and thus the plaintiffs may seek to recover under state common-law principles. State statutory and common-law claims may be joined with federal claims arising out of the same events, and may be litigated in federal court, or, at plaintiffs' option, may be filed separately in state courts.⁴ In sum, the predictability of where suit is likely to be brought is not high, and the selection of the forum, as well as the decision

1. See Securities Exchange Act of 1934, §§ 10(b), 27, 15 U.S.C. §§ 78j, 78aa (1988); Securities Act of 1933, §§ 12(2), 17(a), 15 U.S.C. §§ 77l, 77q (1988); Commodity Exchange Act, § 4b, 7 U.S.C. § 6b (1988).

2. The general federal venue statute provides that an alien can be sued anywhere. 28 U.S.C. § 1391(d) (1982). That provision typically has been deemed to override other more specific venue statutes. See *Brunette Mach. Works v. Kockum Incls., Inc.*, 406 U.S. 706 (1972); *Go-Video, Inc. v. Akai Elec. Co.*, 885 F.2d 1406, 1409-14 (9th Cir. 1989). Alien plaintiffs, however, generally are limited to filing suit where all the defendants reside or where the plaintiffs' claims arose. See *Fleifel v. Vessa*, 503 F. Supp. 129, 130 (W.D. Va. 1980); *Akbar v. New York Magazine Co.*, 490 F. Supp. 60, 66 (D. D.C. 1980). Personal jurisdiction is discussed in text at notes 33-39, *infra*.

3. Generally, state law is not preempted by federal securities law and is allowed to coexist. *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware*, 414 U.S. 117, 137 (1973); *SEC v. National Secs., Inc.*, 393 U.S. 453, 461 (1969); Securities Act of 1933, § 18, 15 U.S.C. § 77r (1988).

4. There may be some disincentive to splitting claims between federal and state courts. If there is any risk that the federal suit will reach judgment first, the state court then may be precluded from going forward with the state claims under federal doctrines of claim preclusion. See RESTATEMENT (SECOND) OF JUDGMENTS § 25 comment e (1980). However, if the state court reaches judgment first, then preclusion may not apply because the state court had no power to adjudicate the federal claims as they were within the exclusive jurisdiction of the

whether more than one suit challenging identical conduct will be filed in more than one court is largely within plaintiffs' control.

A second attribute of American litigation that frequently is viewed with particular skepticism in the international arena is the availability of expansive pretrial discovery. In most cases, the ability of opposing parties to engage in extensive, continuous, and extremely costly discovery, requiring not only the exchange of voluminous documents but also the examination and cross-examination of witnesses through depositions,⁵ is virtually unlimited.⁶ A particular discovery request is proper if the material sought is relevant to the subject matter involved in the pending action and is not privileged.⁷ The information requested need not be for use as evidence at trial, and thus pretrial discovery is not restricted by the formal evidence rules. The requesting party needs only to be inquiring into matters that might lead to evidence that could be used at trial—what some have characterized as a “fishing expedition.” In sum, discovery is controlled largely by the parties rather than by the court. There have been severe criticisms of the American discovery process over the last several years, and some changes have been made.⁸ Various groups continue to suggest additional improvements.⁹ Nonetheless, it is not likely

federal courts. *See* J. FRIEDENTHAL, M. KANE & A. MILLER, *CIVIL PROCEDURE* § 14.7, at 643 (1985).

5. When alien corporations are parties to litigation, depositions can become particularly burdensome because the corporations are required to produce the officials who can answer the relevant inquiry at the place where suit is filed. *See, e.g., Republic of the Philippines v. Marcos*, 888 F.2d 954 (2d Cir. 1989). For example, a Japanese securities dealer being sued in the U.S. Federal District Court for the Northern District of Illinois by an American plaintiff who purchased securities through a global securities market might be compelled to produce its employees for a deposition in Chicago, Illinois.

6. In the federal courts, there are no numerical limits with regard to the number of discovery requests or the amount of discovery that may be undertaken. The court does have authority to limit discovery that is unreasonably duplicative, oppressive, or disproportionate to the matters involved in the case. *FED. R. CIV. P. 26(b)(1)*. However, those powers are not utilized frequently. The main method of containing discovery is through court management powers and the setting of deadlines and detailed plans for completing discovery. *See FED. R. CIV. P. 16*.

7. *FED. R. CIV. P. 26(b)(1)*.

8. The federal discovery rules were amended in 1980, authorizing a discovery conference to work out a plan for discovery, *FED. R. CIV. P. 26(f)*, and in 1983 giving the court additional authority to limit discovery and requiring counsel to sign all discovery requests and answers attesting that the request or response is being made after a reasonable inquiry, not for an improper purpose, and that it is not unreasonable or unduly burdensome. *FED. R. CIV. P. 26(g)*.

9. *See, e.g., Committee on Discovery, New York State Bar Ass'n, Section on Commercial & Federal Litigation, Report on Discovery Under Rule 26(b)(1)*, 127 F.R.D. 625 (1989); BROOKINGS TASK FORCE ON CIVIL JUSTICE REFORM, *JUSTICE FOR ALL: REDUCING COSTS AND DELAY IN CIVIL LITIGATION* (1989).

that the broad ranging character or scope of pretrial discovery is likely to be altered substantially. Consequently, that reality simply must be confronted when thinking about future securities litigation in the United States.

A third feature of American litigation is that jury trials may be demanded on most claims filed by private citizens seeking rescission of their transactions or monetary damages relating to them.¹⁰ The complexity of the litigation is not a ground for avoiding jury trial.¹¹ The jury trial right exists except when the plaintiffs seek solely injunctive relief. The use of a jury means that it will take much longer for the litigation to reach trial because the wait on the jury docket typically is much greater than on the judge docket.¹² More important, however, is the fact that because the civil jury is a common-law creation, litigants from civil-law jurisdictions, such as Japan, may regard reliance on it as the primary decisionmaker as irrational and unpredictable.¹³ Whatever the merits of these concerns,¹⁴ the American commitment to the civil jury is clear and firm and must be recognized.

The fourth feature of American litigation to consider involves an evaluation of potential exposure or recovery as a result of litigation stemming from securities transactions. The federal securities laws authorize civil and criminal penalties to be recovered by the Securities Exchange Commission in addition to providing a cause of action for private investors.¹⁵ In many instances, investors may be able to recover damages beyond the actual losses sustained. Punitive damages may be available in

10. The right to a civil jury trial is preserved in the federal courts under the seventh amendment of the United States Constitution. Most states have comparable constitutional provisions in their respective state constitutions, although they may interpret them somewhat differently. See J. FRIEDENTHAL, M. KANE & A. MILLER, *supra* note 4, § 11.7, at 503.

11. The Supreme Court has not specifically ruled on the question of whether there is a complexity exception to the seventh amendment right to a civil jury. However, the lower courts which have addressed the issue either have rejected the argument outright, e.g., *In Re U.S. Fin. Sec. Litig.*, 609 F.2d 411, 426 (9th Cir. 1979), *cert. denied*, 446 U.S. 929 (1980), or have limited this possibility in such a way as to make its availability virtually nonexistent, e.g., *In Re Japanese Elec. Prod. Antitrust Litig.*, 631 F.2d 1069, 1088-89 (3d Cir. 1980). See generally J. FRIEDENTHAL, M. KANE & A. MILLER, *supra* note 4, § 11.5, at 496-97.

12. See generally G. BERMANT, J. CECIL, A. CHASET, E. LINE & P. LOMBARD, *PROTRACTED CIVIL TRIALS: VIEWS FROM THE BENCH AND THE BAR* 42-45 (1981).

13. Even England, from which the American jury trial tradition is taken, has limited jury trials to only certain very specialized cases, which would not include securities actions. See Administration of Justice (Miscellaneous Provisions) Act, 1933, 23 & 24 Geo. 5, ch. 36, § 6.

14. In fact, although fear of juries often is expressed by defendants, in complex litigation where the plaintiff bears the burden of proof, the use of a jury to determine liability may actually be to the defendant's benefit because the very complexity of the case may make it more difficult for the plaintiff to clearly establish liability.

15. Securities Act of 1933, §§ 11, 12, 20, 24, 15 U.S.C. §§ 77k, 77l, 77t, 77x (1988); Secur-

cases of intentional or malicious wrongdoing.¹⁶ Additionally, there is a potential explosion in the scope of recovery if conduct found to violate some securities law also is deemed to constitute a pattern of racketeering, thus authorizing additional recovery under the federal Racketeer Influenced and Corrupt Organizations Act (RICO).¹⁷ Recoveries under RICO include treble damages and attorney fees for injuries resulting from a violation of the statute's provisions.¹⁸ The wide-ranging applications of RICO in numerous business fields suggests that litigation exposure in an international securities market may include that statute's penalties, as well as the more traditional remedies of rescission or compensatory damages.¹⁹

The fifth and final feature of American securities litigation deserving special mention is by no means the least important. Private securities litigation has prospered in the United States, and can be contemplated even by the small individual investor because it is commonly brought in the form of a class action.²⁰ The features of a class action suit not only increase the complexity and investment necessary to conduct litigation,²¹ but they also enlarge the potential exposure. Further, multiple lawsuits (even multiple class actions) premised on the same conduct and filed in various courts throughout the nation are common. As a consequence, a defendant confronted by the possibility of U.S. securities litigation may contemplate defending highly complex suits involving very large aggregates of investors, in multiple fora.²²

ities Exchange Act of 1934, §§ 9, 18, 21, 21A, 32, 15 U.S.C. §§ 78i, 78r, 78v, 78v-1, 78ff (1988).

16. See, e.g., *Whitney v. Citibank, N.A.*, 782 F.2d 1106, 1118 (2d Cir. 1986); *Aldrich v. Thomson McKinnon Sec., Inc.*, 756 F.2d 243, 247 (2d Cir. 1985); *Walker v. Sheldon*, 10 N.Y.2d 401, 404, 179 N.E.2d 497, 498, 223 N.Y.S.2d 488, 490 (1961); CAL. CIV. CODE § 3294 (Deering 1984).

17. 18 U.S.C. §§ 1961-1968 (1988). RICO contains several criminal penalties for its violation, but it is not necessary that a defendant be criminally convicted before a civil action is brought. See *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 488-93 (1985).

18. 18 U.S.C. § 1964(c) (1988).

19. In the international arena, RICO was held applicable to certain activities of former President Ferdinand Marcos of the Philippines. *Republic of Philippines v. Marcos*, 818 F.2d 1473 (9th Cir. 1987), *aff'd en banc*, 862 F.2d 1355 (1988), *cert. denied*, 109 S. Ct. 1933 (1989). For a general discussion on how RICO may be applied in the securities context, see R. JENNINGS & H. MARSH, *SECURITIES REGULATION* 1493-1508 (6th ed. 1987).

20. See generally 7B C. WRIGHT, A. MILLER & M. KANE, *FEDERAL PRACTICE AND PROCEDURE: CIVIL* 2D § 1781, at 27-53 (1st ed. 1986).

21. Often, significant time is spent in determining whether the class can be certified and what its scope should be. Further, as a class suit, specialized notice requirements to the absent class members must be followed, FED. R. CIV. P. 23(c)(2), and settlement of the lawsuit can be accomplished only after notice, a hearing, and with judicial approval, FED. R. CIV. P. 23(c).

22. Some relief is provided from multiple lawsuits by the operation of the multidistrict

II. AMERICAN SECURITIES LITIGATION IN THE INTERNATIONAL SETTING

A brief look at the special rules applicable to international civil litigation in U.S. courts indicates that, for the most part, the five characteristics of American securities litigation just described are pertinent when international transactions or parties are involved. In particular, American courts generally extend the reach of federal securities laws to assert jurisdiction over non-United States citizens, and engage in broad discovery of evidence, all outside the boundaries of the country.

The federal securities laws contain broad prohibitions against fraudulent conduct relating to the issuance and trading of securities.²³ Even though none of these statutes expressly refer to foreign commerce or transactions, U.S. courts have consistently applied the laws in actions premised on fraudulent conduct occurring partially or entirely abroad.²⁴ The premises for asserting legislative jurisdiction over these cases are that relevant conduct underlying the transactions occurred in the United States or the effects of the transaction were felt there, and that the extra-territorial application would be consistent with the purposes underlying the statute.²⁵ These circumstances are deemed to establish a legitimate interest for the United States to apply its own law to the transaction.²⁶

At the risk of oversimplifying the very difficult problem of deciding when U.S. legislative interests will be asserted in cases dealing with foreign transactions,²⁷ three general propositions may be advanced. First, foreign plaintiffs may claim protection under American securities laws if substantial acts in furtherance of the fraud occurred within the United

transfer statute allowing the transfer and consolidation of related cases by application to a special panel, the Multidistrict Litigation Panel. 28 U.S.C. § 1407 (1988). However, transfer is limited to pretrial, not trial. For proposals to change and expand that approach, see *infra* note 79.

23. See generally authorities cited *supra* note 1.

24. See generally Hacker & Rotunda, *The Extraterritorial Regulation of Foreign Business Under the U.S. Securities Laws*, 59 N.C.L. REV. 643 (1981); Thomas, *Extraterritoriality in an Era of Internationalization of the Securities Markets: The Need to Revisit Domestic Policies*, 35 RUTGERS L. REV. 453 (1983); Note, *American Adjudication of Transnational Securities Fraud*, 89 HARV. L. REV. 553 (1976).

25. See *Tamari v. Bache & Co. (Lebanon) S.A.L.*, 730 F.2d 1103, 1107 (7th Cir.), *cert. denied*, 469 U.S. 871 (1984).

26. State laws similarly have been applied to foreign transactions. *E.g.*, *Hoylake Inv. Ltd. v. Washburn*, 723 F. Supp. 42, 49 (N.D. Ill. 1989) (Illinois Insurance Holding Company Systems Act).

27. Much more elaborate and refined guidelines can be found in RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 416 (1986). See also Note, *supra* note 24.

States.²⁸ Second, American plaintiffs may seek protection under the antifraud provisions of the federal securities laws whether or not acts of material importance occurred in the United States on the theory that the conduct has caused an effect in the United States.²⁹ Third, U.S. law will be applied extraterritorially to transactions resulting in losses to Americans residing abroad if some acts of material importance in the United States have contributed significantly to the loss or fraud. Perhaps not surprisingly, serious disputes arise in litigation involving foreign plaintiffs or American plaintiffs residing abroad concerning whether the particular conduct involved has a substantial enough connection with the United States to fall within the scope of these general rules.³⁰ Whatever their outcome, it is clear that the extraterritorial application of U.S. antifraud provisions in a global securities market will cause serious concern. Indeed, two very recently initiated cases brought by the Securities Exchange Commission involving claims of transnational insider trading indicate additional areas of U.S. interest.³¹

The primary means of moderating the effects of or coming to some agreement about the extraterritorial application of national laws is through bilateral or multilateral treaties. This approach has been quite successful in the tax field and, has more recently, been utilized with respect to the scope of application of U.S. antitrust laws.³² Treaties may offer the best solution here.

Little restraint on the ability of the American courts to give extraterritorial effect to their laws can be found in limitations on their jurisdictional reach over alien defendants. Under special provisions in the federal securities law, U.S. courts are given authority to assert personal (as contrasted to legislative) jurisdiction over defendants residing outside

28. *E.g.*, *Psimenos v. E.F. Hutton & Co.*, 722 F.2d 1041, 1046 (2d Cir. 1983); *Grunenthal GmbH v. Hotz*, 712 F.2d 421, 425-26 (9th Cir. 1983); *Continental Grain (Australia) Pty. Ltd. v. Pacific Oilseeds, Inc.*, 592 F.2d 409, 420-21 (8th Cir. 1979); *SEC v. Kasser*, 548 F.2d 109, 114-16 (3d Cir.), *cert. denied*, 431 U.S. 938 (1977).

29. *See* *Schoenbaum v. Firstbrook*, 405 F.2d 200, 206-08 (2d Cir.), *modified en banc*, 405 F.2d 215 (2d Cir. 1968), *cert. denied*, 395 U.S. 906 (1969). *But cf.* *MGC, Inc. v. Great Western Energy Corp.*, 896 F.2d 170, 175 (5th Cir. 1990) (U.S. law not applied when corporation established a foreign subsidiary to purchase securities in overseas offering closed to U.S. purchasers and subsequently claimed fraud in the offering).

30. For an excellent summary of the court treatment in the securities area, see G. BORN & D. WESTIN, *INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS* 480-83 (1989). *See generally* *Extraterritoriality of Economic Legislation*, *LAW & CONTEMP. PROBS.*, Summer 1987, at 1.

31. *See* *SEC v. Finacor Anstalt*, No. 89-7667 (S.D.N.Y. filed Nov. 16, 1989); *SEC v. Foundation Hai*, No. 90-0277 (S.D.N.Y. Mar. 1, 1990).

32. *See* G. BORN & D. WESTIN, *supra* note 30, at 473.

the country.³³ Further, service of process may be accomplished abroad under the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters.³⁴ Japan and the United States are both signatories to that Convention as are twenty-one other countries. Service in nonsignatory nations may be accomplished under other more specialized or formal procedures, including the use of letters rogatory.³⁵

Foreign defendants may challenge an American court's assertion of jurisdiction by claiming that it violates their due process rights, based on their lack of contact with the United States.³⁶ If the plaintiffs' claims are premised on some violation of state law, jurisdiction may be asserted only on the basis of the defendants' contacts or conduct directed toward the forum state.³⁷ However, defendants' contacts with the nation as a whole may be considered when claims are brought under the federal securities laws.³⁸ The United States Supreme Court has recognized that there may be unique burdens placed on alien litigants forced to defend in American courts (particularly with regard to transactions entered into outside the country), and that those burdens should be evaluated care-

33. See Securities Act of 1933, § 22, 15 U.S.C. § 77v (1988), Securities Exchange Act of 1934, § 27, 15 U.S.C. § 78aa (1988). The federal RICO statute, however, has been interpreted to authorize only nationwide service. See, e.g., *Michelson v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 709 F. Supp. 1279, 1285 (S.D.N.Y. 1989); *Soltex Polymer Corp. v. Fortex Indus.*, 590 F.Supp. 1453, 1460 (E.D.N.Y. 1984), *aff'd*, 832 F.2d 1325 (2d Cir. 1987). In state courts or in federal courts adjudicating claims based on state law, state long-arm provisions authorize the assertion of jurisdiction over alien defendants. See, e.g., *State of North Carolina ex rel. Long v. Alexander & Alexander Servs. Inc.*, 680 F. Supp. 746, 749-51 (E.D.N.C. 1988).

34. Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, *opened for signature* Nov. 15, 1965, 20 U.S.T. 361, T.I.A.S. No. 6638, 658 U.N.T.S. 163 (entered into force Feb. 10, 1969). It may not even be necessary to resort to international service if the defendant is deemed to have an agent who can be served in the United States. E.g., *SEC v. Foundation Hai*, [1989-1990 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 94,961, at 95,379 (March 1, 1990) (U.S. brokers are agents for foreign defendants in international insider trading action).

35. For an explanation of the different service techniques, see Degnan & Kane, *The Exercise of Jurisdiction Over and Enforcement of Judgments Against Alien Defendants*, 39 HAST. L.J. 799, 834-43 (1988).

36. See generally *International Shoe Co. v. Washington*, 326 U.S. 310, 320 (1945).

37. See, e.g., *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 112-13 (1987); *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 418 (1984).

38. E.g., *Securities Inv. Protection Corp. v. Vigman*, 764 F.2d 1309, 1314-16 (9th Cir. 1985); *Paulson Inv. Co. v. Norbay Secs., Inc.*, 603 F. Supp. 615, 618 (D. Or. 1984); *Alco Standard Corp. v. Benalal*, 345 F. Supp. 14, 24-25 (E.D. Pa. 1972). A foreign defendant who has property in the United States, such as a bank or securities account, also may have its property attached or garnished for purposes of establishing jurisdiction. See, e.g., *Amoco Overseas Oil Co. v. Compagnie Nationale Algérienne de Navigation*, 605 F.2d 648, 654-55 (2d Cir. 1979); *Louring v. Kuwait Boulder Shipping Co.*, 455 F. Supp. 630, 632-33 (D. Conn. 1977).

fully when considering whether it would be fair to require them to do so.³⁹ Although this additional consideration does not offer much predictability in the sense of being able to assess in advance whether engaging in a particular transaction carries with it the potential of having to defend a U.S. lawsuit should the transaction or some element of it later be challenged, it does provide an important protection against undue hardship.

The potential for defendants to obtain dismissals based on the doctrine of forum non conveniens is of more practical import in the international setting.⁴⁰ Forum non conveniens allows a court to dismiss an action even though all the requirements establishing it as a proper forum are satisfied. Dismissal will be ordered based on a finding that the forum is an inconvenient one and that a preferable alternative forum exists.⁴¹ The presumption is to honor the plaintiffs' forum choice, although this presumption is lessened if the plaintiffs are aliens.⁴² Further, the presumption can be overcome when both the private interests tied to the litigants' convenience and the public interests affecting the forum court's convenience suggest that dismissal is appropriate. It is well-recognized that the possibility of larger damage awards, better discovery, and the use of substantive rules that may be more favorable to plaintiffs often encourages the filing of suits in American courts. However, dismissal will not be barred solely because of an unfavorable change in the law. Indeed, dismissal may be deemed appropriate if it is shown that the plaintiff chose a particular forum not because it was convenient (in the sense of the availability of witnesses or evidence), but to take advantage of favorable law.⁴³ The success of forum non conveniens challenges is not assured.⁴⁴ Nonetheless, the doctrine has been shaped in recognition of the kinds of problems that may be posed when international litigation is

39. *Asahi*, 480 U.S. at 112-13. See generally Degnan & Kane, *supra* note 35, at 809-16.

40. See, e.g., *Transunion Corp. v. PepsiCo, Inc.*, 811 F.2d 127, 129 (2d Cir. 1987) (RICO); *Fustok v. Banque Populaire Suisse*, 546 F. Supp. 506, 509-14 (S.D.N.Y. 1982) (Commodity Exchange Act).

41. See *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 249, 260 (1981); *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 507-09 (1947). For a discussion of how forum non conveniens might be applied in cases involving foreign litigants, see Degnan & Kane, *supra* note 35, at 824-34.

42. *Piper*, 454 U.S. at 255.

43. *Id.* at 249. However, if a foreign plaintiff shows that its choice of a U.S. court is based on convenience, the presumption to honor plaintiff's choice may be invoked. *Lony v. E.I. Du Pont de Nemours & Co.*, 886 F.2d 628, 634 (3d Cir. 1989).

44. The text's description reflects federal standards. State courts are free to develop their own standards and, in fact, the availability of forum non conveniens is so severely restricted in some states that it is almost useless to defendants confronted by litigation in an inconvenient forum. E.g., *Dow Chem. Co. v. Castro Alfaro*, 786 S.W.2d 674, 679 (Tex. 1990); *Kassapas v. Arkon Shipping Agency, Inc.*, 485 So. 2d 565 (La. Ct. App. 1986), *cert. denied*, 479 U.S. 940 (1986); *Kristensen v. Strinden*, 343 N.W.2d 67, 70-71 (N.D. 1983). See generally Greenberg,

brought in U.S. courts due to the view that U.S. law offers more favorable opportunities for recovery. Forum non conveniens allows the courts to exercise discretion to refuse jurisdiction over cases in which the United States actually has only a tangential interest. The doctrine thus serves as an important restraint on what some might perceive as an unreasonably expansive U. S. view of jurisdiction over transactions outside its borders.

Finally, if a U.S. court asserts jurisdiction over a case arising out of an international securities transaction or involving foreign parties, parties may seek access to materials or witnesses located outside the United States. Although evidence located abroad may be obtained by requesting the assistance of foreign judicial authorities,⁴⁵ traditional international procedures are costly and time-consuming. The United States has entered into a memorandum of understanding concerning the sharing of information with both Switzerland⁴⁶ and Japan⁴⁷ for some proceedings brought by the Securities Exchange Commission. However, in the vast majority of cases, U.S. courts simply act unilaterally and order litigants and witnesses to produce information located abroad.⁴⁸ As long as the

The Appropriate Source of Law for Forum Non Conveniens Decisions in International Cases: A Proposal for the Development of Federal Common Law, 4 INT'L TAX & BUS. LAW. 155 (1986).

45. The primary contemporary effort to improve assistance in foreign discovery is the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, *opened for signature* Mar. 18, 1970, 23 U.S.T. 2555, T.I.A.S. No. 7444, 847 U.N.T.S. 231. Twenty-five countries including the United States and Japan are signatories to that Convention. Whatever its advantages, the Supreme Court has ruled that resort to the Convention when discovery is sought in another signatory state is not mandatory, or even required as a matter of first resort; the Convention serves only as an additional framework for authorizing discovery. *Société Nationale Industrielle Aerospatiale v. United States District Court*, 482 U.S. 522, 538 (1987). The Court also refused to "articulate specific rules to guide this delicate task of adjudication," *id.* at 546, leaving to the district courts the problem of determining when and how the Convention will be applied rather than the general federal discovery rules. For a proposed method of analysis, see Youngblood & Welsh, *Obtaining Evidence Abroad: A Model for Defining and Resolving the Choice of Law Between the Federal Rules of Civil Procedure and the Hague Evidence Convention*, 10 U. PA. J. INT'L BUS. L. 1 (1988). A proposed amendment of Federal Rule of Civil Procedure 26(a) would require discovery to proceed under international treaties, unless such discovery was deemed "inadequate" or "inequitable."

46. Memorandum of Understanding to Establish Mutually Acceptable Means for Improving International Law Enforcement Cooperation in the Field of Insider Trading, Switzerland-United States, 22 I.L.M. 1 (1983); Memorandum of Understanding on Exchange of Information in Matters Relating to Securities and Futures, United Kingdom-United States, 25 I.L.M. 1431 (1986); Memorandum of Understanding on Administration and Enforcement of Securities Laws, Canada-United States, 27 I.L.M. 410 (1988).

47. Memorandum of the U.S. Securities and Exchange Commission and the Securities Bureau of the Japanese Ministry of Finance on the Sharing of Information, Japan-United States, 25 I.L.M. 1429 (1986).

48. For a more thorough exploration of the American discovery efforts abroad, see G. BORN & D. WESTIN, *supra* note 30, at 261-334.

court has jurisdiction over the person or entity having control of the information or documents, the court is deemed to have the authority to order compliance with a discovery order.⁴⁹ Courts consistently hold that the United States can compel its citizens residing abroad to give testimony in, and to produce documents for U.S. litigation.⁵⁰ Failures to comply with discovery orders have resulted in the imposition of sanctions.⁵¹ As recognized by the American Law Institute, "no aspect of the extension of the American legal system beyond the territorial frontier of the United States has given rise to so much friction as the request for documents in investigation and litigation in the United States."⁵² Several countries have responded by enacting blocking statutes, which prohibit compliance with foreign discovery orders and often provide for criminal penalties for violations thereof.⁵³ The presence of a blocking statute does not guarantee the litigant or witness protection from U.S. sanctions for noncompliance,⁵⁴ however. The courts will decide on a case-by-case basis whether to defer to the foreign statute or order discovery notwithstanding it.⁵⁵ Thus, discovery abroad may pose a significant problem to parties involved in litigation arising out of a dispute in a global securities market.⁵⁶

49. See *United States v. Bank of Nova Scotia*, 691 F.2d 1384, 1388-89 (11th Cir. 1982), cert. denied, 462 U.S. 1119 (1982); *United States v. Vetco Inc.*, 644 F.2d 1324, 1329 (9th Cir. 1981); *United States v. First Nat'l City Bank*, 396 F.2d 897, 900-01 (2d Cir. 1968). See generally RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 442(1) (1987).

50. See, e.g., *Blackmer v. United States*, 284 U.S. 421, 439 (1932).

51. E.g., *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinée*, 456 U.S. 694, 707-08 (1982); *SEC v. Banca della Svizzera Italiana*, 92 F.R.D. 111, 119 (S.D.N.Y. 1981).

52. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 442 reporter's note 1 (1987).

53. These statutes range from blanket prohibitions against compliance with foreign discovery orders to automatic or discretionary prohibitions against disclosure of certain types of information. See generally B. RISTAU, *INTERNATIONAL JUDICIAL ASSISTANCE* §§ 3-4 to 3-7 (1984 & Supp. 1986).

54. E.g., *Roberts v. Heim*, 130 F.R.D. 430 (N.D. Cal. 1990) (Swiss defendant in class securities fraud action required to appear for deposition, produce documents, and respond to requests for admission in United States despite Swiss blocking statute).

55. A plaintiff may not be sanctioned by dismissal if the record shows a good faith effort to comply with a discovery order blocked by foreign law because to do so violates fifth amendment due process. See *Société Internationale pour Participations Industrielles et Commerciales, S.A. v. Rogers*, 357 U.S. 197, 201-02 (1958); *United States v. First Nat'l Bank of Chicago*, 699 F.2d 341, 345-46 (7th Cir. 1983).

56. See generally McNew, *Blocking Laws and Secrecy Provisions: Do International Negotiations Concerning Insider Trading Provide a Solution to Conflicts in Discovery Rules*, 26 CAL. W.L. REV. 103 (1989-90).

III. OPPORTUNITIES TO CONTROL LITIGATION AND GAIN PREDICTABILITY

The first portion of this Article painted what many may view as a depressing picture of U.S. litigation prospects in the international securities field. There is, however, a note of optimism in the guise of some possibilities for control by the parties themselves, as well as by the courts.

When evaluating dispute resolution possibilities, it is important to be aware that American courts are quite receptive to the notion that parties in consensual transactions should be able to enter into agreements affecting how their disputes will be resolved. Party autonomy is a prized value in the United States. Thus, parties in securities transactions may achieve some control and predictability in the litigation process by contracting in advance regarding dispute resolution. There are three primary areas that should be considered.

First, concerns about where litigation is brought may be controlled by forum selection clauses, which receive special deference in international cases.⁵⁷ As stated by the United States Supreme Court, forum clauses should be enforced unless the resisting party can "clearly show that enforcement would be unreasonable and unjust, or that the clause was invalid for such reasons as fraud or overreaching."⁵⁸ Applying this standard, several lower federal courts have dismissed securities fraud claims in deference to forum selection agreements.⁵⁹ In evaluating whether the selection of a particular court is unreasonable, the use of such clauses reflects a legitimate desire to eliminate the uncertainty confronting companies or individuals of differing nationalities as to the nature and location of the tribunal for resolving their disputes, as well as to obtain some certainty with regard to the law that will be applied.⁶⁰ Indeed, a forum in a country other than that of the contracting parties may be designated in a legitimate effort to choose a neutral court and avoid

57. "A contractual provision specifying in advance the forum in which disputes shall be litigated and the law to be applied is, therefore, an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction. Furthermore, such a provision obviates the danger that a dispute under the agreement might be submitted to a forum hostile to the interests of one of the parties or unfamiliar with the problem area involved." *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 516 (1974).

58. *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15 (1972); see also RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 80 (1971).

59. See, e.g., *AVC Nederland B.V. v. Atrium Inv. Partnership*, 740 F.2d 148, 159 (2d Cir. 1984); *Medoil Corp. v. Citicorp*, [1989-1990 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 94,930 (S.D.N.Y. Feb. 9, 1990); *Diatronics, Inc. v. Elbit Computers, Ltd.*, 649 F. Supp. 122, 127 (S.D.N.Y. 1986).

60. *Zapata*, 407 U.S. at 13 n.15.

fears of bias associated with either party's own national court.⁶¹ Consideration of whether the forum selected is unreasonable centers on factors such as whether the court is extremely inconvenient for the resisting party⁶² and whether the choice of forum clause itself was entered into as a result of the unfair use of unequal bargaining power between the parties.⁶³ In the absence of such findings, the parties' choices will typically be honored.⁶⁴

A second area of party control involves the inclusion in a contract of a carefully drafted choice of law clause. The law of the state or country chosen by the parties generally will be honored by American courts unless "the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice,"⁶⁵ or unless the law chosen is contrary to a fundamental policy of the state of the forum court.⁶⁶ However, the use of choice of law clauses may not eradicate all uncertainty. They are relevant only with regard to disputes arising out of party agreements, and thus cannot be used to limit the application of American law with reference to fraud claims that do not arise out of some contractual relationship. Nonetheless, choice of law provisions should be considered, at least with reference to indemnity agreements that might be contemplated between various participants in the securities markets, because they do offer some predictability and control for contractual relationships.

The third and final area in which parties are given some opportunity to control the dispute resolution process involves agreements to arbitrate. These agreements allow the definitive resolution of disputes by a disinterested nongovernmental body.⁶⁷ Indeed, the Supreme Court has enforced the arbitration provisions of an international contract against the challenge that doing so sacrificed the rights of American investors under the

61. *E.g., id.* at 17.

62. *E.g., Copperweld Steel Co. v. Demas-Mannesmann-Bohler*, 578 F.2d 953, 965 (3d Cir. 1978).

63. Fraud in procuring the underlying contract does not vitiate the forum selection clause; only fraud tied to the inclusion of the clause itself does so. *See Scherk v. Alberto-Culver Co.*, 417 U.S. 506, at 519 n.14 (1974).

64. The drafting of a choice of forum clause is critically important to avoid any ambiguities regarding the parties' intentions. For some examples of common approaches, see G. BORN & D. WESTIN, *supra* note 30, at 176.

65. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187(2)(a) (1971).

66. As to what might constitute a fundamental policy allowing avoidance of a choice of law clause, see Reese, *Power of Parties to Choose Law Governing Their Contract*, 1960 PROC. AM. SOC'Y INT'L L. 49, 54-55. *See also* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 comment g (1971).

67. Arbitral agreements will be enforced subject to the same defenses that are available in challenging forum selection clauses. *See supra* text accompanying notes 57-64.

federal securities laws.⁶⁸ The Court noted that "[a] parochial refusal by the courts of one country to enforce an international arbitration agreement . . . would invite unseemly and mutually destructive jockeying by the parties to secure tactical litigation advantages [T]he dicey atmosphere of such a legal no-man's-land would surely damage the fabric of international commerce and trade, and imperil the willingness and ability of businessmen to enter into international commercial agreements."⁶⁹ In fact, an agreement to arbitrate a dispute in a particular state often is interpreted as a consent to jurisdiction in that state's courts because that is the only court in a position to enforce the arbitration provision.⁷⁰ Finally, the United States has ratified the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards,⁷¹ and thus, on the basis of reciprocity, will enforce awards in commercial disputes that are entered into in the territory of a party to the Convention.⁷²

An agreement to arbitrate ensures both the avoidance of jury trial, and the use of judges who have special expertise. Indeed, the parties have the ability to choose the persons who will decide their dispute. In addition, arbitration may permit the consolidation of all disputes between the parties in a single forum,⁷³ thereby avoiding the time, expense, and uncertainty associated with multiple proceedings. Finally, unlike court adjudication, both the proceedings and the award in international arbitration are typically treated as confidential.⁷⁴

Arbitration may not avoid all of the concerns associated with litiga-

68. *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 518 (1974). *See also* *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 640 (1985) (arbitration of international antitrust dispute upheld). The Supreme Court also has upheld arbitration agreements in securities cases that did not have an international element. *See Rodriguez de Quijas v. Shearson/American Express, Inc.*, 109 S. Ct. 1917, 1921 (1989); *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 226 (1987).

69. *Scherk v. Alberto-Culver Co.*, 417 U.S. at 516-17.

70. *E.g.*, *Victory Transport, Inc. v. Comisaria Gen.*, 336 F.2d 354, 363 (2d Cir. 1969), *cert. denied*, 381 U.S. 934 (1964); *Gilbert v. Burnstine*, 255 N.Y. 348, 358, 174 N.E. 706, 709 (1931).

71. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 1.

72. *See generally* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 487 (1987); Ebke & Parker, *Foreign Country Money-Judgments and Arbitral Awards and the Restatement (Third) of the Foreign Relations Law of the United States: A Conventional Approach*, 24 INT'L L. 21, 45 (1990). As of 1990, 81 states were parties to the Convention. 9 U.S.C.A. § 201 (West Supp. 1990).

73. *See, e.g.*, *Compañía Española de Petroleos v. Nereus Shipping, S.A.*, 527 F.2d 966, 975 (2d Cir. 1975), *cert. denied*, 426 U.S. 936 (1976).

74. COMMERCIAL ARBITRATION RULES art. 25, *reprinted in* E. LEE, *ENCYCLOPEDIA OF INTERNATIONAL COMMERCIAL ARBITRATION* ¶ 844 (1986); RULES FOR THE ICC COURT OF

tion, however. Arbitration is a type of formal adversarial proceeding with full opportunity for examination and cross-examination. The proceedings are typically somewhat less rigid and formal than court litigation in that the evidence offered need not conform to the legal rules of evidence applicable in court. Arbitrators do not have authority themselves to utilize discovery devices. However, at the request of either party, they may subpoena documents or witnesses for the hearing.⁷⁵ Arbitration results in specific findings and a final binding decision. Further, despite the absence of a jury, the potential for large recoveries (even including punitive damages, rather than a compromise figure) remains.⁷⁶ Thus, although it is not a panacea, the use of arbitration offers some opportunities for streamlining and making more predictable the dispute resolution process.⁷⁷

Another possibility for garnering additional control over complex securities litigation lies not in the parties, but in court reform. This possibility is inherently more speculative, as it relies on future legislative developments. Insofar as some of the concerns in international securities litigation stem from its complexity and the delay and costs attendant to it, as well as from the spectre of multiple lawsuits in multiple courts being prosecuted simultaneously or seriatim, those concerns are representative of more general problems that are confronting American business litigants today. Although no clear solutions are on the horizon, serious proposals are being made for federal courts to be given increased powers to allow for tighter or better judicial management of complex suits.⁷⁸ Additionally, proposals providing for the consolidation of dispersed litigation and the effective management of individual cases in order to avoid repetitive lawsuits are being developed under the auspices of the Ameri-

ARBITRATION art. 15 (1982), reprinted in E. Lee, *supra* ¶ 432 (1986); ICSID ARBITRATION RULES, Rules 6(2) & 48(4) (1984).

75. A party may petition the court for pre-arbitration discovery, although that will be ordered only in extreme circumstances. See Katsoris, *The Arbitration of a Public Securities Dispute*, 53 FORDHAM L. REV. 279, 287 n.52 (1984). Discovery also may be controlled by the inclusion of specific provisions in the arbitration clause regarding what is permissible. See W. CRAIG, W. PARK & J. PAULSSON, INTERNATIONAL CHAMBER OF COMMERCE ARBITRATION § 8.09 (1984).

76. See, e.g., *Bonar v. Dean Witter Reynolds, Inc.*, 835 F.2d 1378 (11th Cir. 1988); *Wiloughby Roofing & Supply Co. v. Kajima Int'l Inc.*, 598 F. Supp. 353, 358-59 (N.D. Ala. 1984), *aff'd*, 776 F.2d 269 (11th Cir. 1985); *Willis v. Shearson/American Express*, 569 F. Supp. 821 (M.D.N.C. 1983). See generally Jones, *Punitive Damages as an Arbitration Remedy*, 4 J. INT'L ARB., June 1987, at 35.

77. See generally Kanowitz, *Using the Mini-Trial in United States-Japan Business Disputes*, 39 MERCER L. REV. 641 (1988).

78. See, e.g., Civil Justice Reform Act of 1990, S. 2648, 101st Cong., 2d Sess. (1990).

can Law Institute.⁷⁹ Whether any of these proposals will be enacted into law, or what their effect may be is not clear. However, the presence of such proposals indicates the likelihood that some changes in the American litigation process will be forthcoming. Further, those changes have the potential of improving the process so that at least some of the concerns of securities litigants may be lessened significantly.

IV. ALTERNATIVES TO TRIAL: DEVICES TO PROMOTE SETTLEMENT

A final matter to consider in evaluating the American dispute resolution scene is the fact that the vast majority of cases filed in U.S. courts never go to trial, but are settled.⁸⁰ American courts are committed to utilizing alternative dispute resolution devices to promote settlement of controversies without the expense of a full trial.⁸¹ This is true even when the parties have not agreed in advance to settle their dispute outside formal court proceedings. Consequently, in order to appreciate fully the ways in which disputes arising in a global securities market might be handled, it is important for international securities litigants to be aware of the array of devices currently in use to negotiate the settlement of commercial disputes.

Various techniques are used by courts and litigants in attempting to overcome the problems associated with reaching settlement agreements and with determining a reasonable amount for settlement. A brief description of three of these techniques illustrates some of the creative ways in which the courts and litigants have been trying to cope with the problems of achieving the settlement of complex cases.

One device that has been developed privately and used in corporate litigation is the mini-trial.⁸² The exact scope and procedures surrounding the use of this device depend on the desires of the parties. However,

79. See AMERICAN LAW INSTITUTE, COMPLEX LITIGATION PROJECT (Tent. Draft No. 1, 1989). The American Law Institute proposals are part of a multiyear study. The 1989 draft proposes a model for consolidating dispersed litigation. Later drafts are designed to address how that model will operate. As a matter of disclosure, I am serving as the Associate Reporter for that Project.

80. See Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4, 27, 28 (1983) (about 90% of all civil cases settled are privately).

81. See FED. R. CIV. P. 16(c)(7). Although U.S. courts now are committed to encouraging settlement, there is considerable disagreement and concern about when attempts to encourage become coercive, effectively depriving the litigants of their day in court. See generally 6A C. WRIGHT, A. MILLER & M. KANE, FEDERAL PRACTICE AND PROCEDURE: CIVIL 2D § 1525.1 (2d ed. 1990).

82. See generally Davis & Omlie, *Mini-trials: The Courtroom in the Boardroom*, 21 WIL-

the mini-trial generally entails a confidential process with limited discovery, after which attorneys for each side present a very abbreviated version of their case to a neutral advisor (who is often a retired judge or well-respected lawyer) and to a panel composed of managers or corporate officers who have authority to settle. After the presentation of the case, the managers enter into settlement negotiations. Mini-trials have been most useful in litigation that has become enmeshed in discovery and pretrial motion disputes; they allow what has become a legal problem to be restored to a business problem.

A second device deserving mention is the summary jury trial.⁸³ Summary jury trials are court devices utilized most commonly when the judge determines that a crucial barrier to settlement is that the parties' expectations of who will win and who will lose, or of what the size of the recovery is likely to be, are so far apart as to make it impossible to achieve a reasonable compromise. To overcome this problem, the court will empanel a six member jury and the parties will be allowed to present a shortened or summary version of their cases to that jury. Typically, these presentations will take no longer than one day. The decision reached by the jury is not binding in any way, but it is used as a basis for each side to reassess their expectations and to discuss settlement more realistically.

The third and final device for encouraging settlement is one that has been developed and used in the context of mass products liability and toxic tort litigation in the United States. These cases typically involve thousands of alleged victims suing multiple defendants. The complicated nature of proof necessary to establish liability and apportion it between defendants, as well as to place a value on each individual claimant's injury, has been seen as a significant barrier to settlements in many of these cases. In an effort to overcome that problem, some courts have appointed special masters to help develop formulas to value the claims involved. The masters, in effect, attempt to mediate the dispute with the particular objective of finding or developing some criteria for placing a value on the numerous claims presented.⁸⁴

LAMETTE L. REV. 531 (1985); Kanowitz, *supra* note 77, at 645-48; Morris, *Recent Developments in Alternative Forms of Dispute Resolution (ADR)*, 100 F.R.D. 512, 521-22 (1984).

83. See Lambros, *The Summary Jury Trial and Other Alternative Methods of Dispute Resolution: A Report to the Judicial Conference of the U.S. Committee on the Operation of the Jury System*, 103 F.R.D. 461, 468 (1984).

84. For a description and evaluation of the role of the special master in some mass tort suits, see McGovern, *Toward a Functional Approach for Managing Complex Litigation*, 53 U. CHI. L. REV. 440, 478 (1986); see also McGovern, *Resolving Mature Mass Tort Litigation*, 69 B.U.L. REV. 659, 669 (1989).

Variations of these three devices, as well as additional settlement mechanisms,⁸⁵ exist and should not be overlooked by parties to international securities litigation in the United States. This very brief description in no way presents a complete or exhaustive picture of the alternatives to litigation that may be attempted. It merely introduces some notion of the range of tools that may be utilized and that certainly deserve further study and consideration, both when entering into agreements and when disputes arise.

V. CONCLUSION

This general review of the distinctive features of American international securities litigation as it is conducted today will hopefully provide some insights into the kinds of problems or concerns that should be addressed when contemplating the establishment of a global securities market. No matter how carefully such a market is planned, implemented, and regulated, there can be no doubt that disputes will arise that will require some formal third-party resolution. As indicated, several of the difficulties associated with litigation in the United States can be overcome by prior agreement or planning. Other difficulties may require legislative treatment or, in some instances, international agreements. In all events, however, prior consideration of the matters described in this Article should eliminate most, if not all, of the surprises that occur when litigants from multiple cultural and legal backgrounds attempt to meet on the international dispute resolution field.

85. See, e.g., Levine, *Early Neutral Evaluation: The Second Phase*, 1989 MO. J. DISPUTE RESOLUTION 1.